***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

679

# BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,069
No. 23,070

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIE A. ROBBINS,
NATHANIEL HAIR,

Appellants.

ON APPEAL FROM JUDGMENTS OF
CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



DANIEL H. MARGOLIS
Counsel for Appellants
(Appointed by this Court)

JAMES R. LOFTIS, III
(Associate Counsel)

888 Seventeenth Street, N. W.
Washington, D. C. 20006

October 15, 1969

TABLE OF CONTENTS

## TABLE OF AUTHORITIES*



---

* Cases or Authorities chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED

While being told by a witness that a United States Post Office had been robbed, a policeman (Private Howe) was informed by an unknown stranger that three men carrying a gray trash can had been seen running out of the Post Office and had gotten into a white or light colored automobile and driven away. Private Howe relayed this information to another policeman (Private Brown, a motorcycle officer) who soon after observed and then investigated a yellow 1962 Ford convertible with one Negro male in it, but decided that it was not the car used in the get-away and did not contain the suspects sought. Nevertheless, a short time later and with no additional relevant information, Private Brown summoned help, stopped the yellow 1962 Ford convertible, arrested its two occupants (the appellants herein), and searched the car, seizing in the process a trash can from the seat containing certain money subsequently identified as having been stolen from the Post Office, money from appellant Robbins also subsequently identified as having been stolen from the Post Office, and two guns from under the floor mats.

I. As to both appellants, were the guns, monies, trash can and its contents seized in violation of appellants' Fourth Amendment rights, making their admission at trial reversible error?

A. Did the police have probable cause to stop and arrest the appellants?

B. Did the police have reasonable grounds to seize appellants, short of arrest?

II. In the context of this case, was it prejudicial error requiring reversal for the court to admit over objection a hearsay description of the robbers attributed to an unknown stranger?

III. As to appellant Hair, was it plain error for the District Court to instruct on the inference to be derived from the possession of recently stolen property simultaneously as to both appellants without making reference to the different postures of the evidence against them and without explaining the meaning or applicability of "exclusive possession"?

IV. As to appellant Hair, was it reversible error requiring a new trial for the District Court to deny his motion for severance where the the only evidence against him was that he was arrested in the company of appellant Robbins on whom proceeds of the crime were found and against whom eyewitness identification was produced?

V. As to appellant Hair, did the District Court err in denying his motion for judgment of acquittal where none of the eyewitnesses to the robbery identified him, no identifiable proceeds were found on him, and the only evidence against him was that he was arrested in the company of appellant Robbins?

This case has not previously been before this Court.

## REFERENCES AND RULINGS

### RULINGS

The rulings and instructions of the District Court involved in this appeal are found at the following pages of the transcripts:

1. Trial transcript (hereinafter Tr.) (Vol. I) at 4, 5 (Denial of appellant Hair's motion to suppress based on the Fourth Amendment).

2. Tr. (Vol. I) (January 14, 1969) at 9 (Denial of appellant Robbins' motion to suppress based on the Fourth Amendment) and Tr. at 198 (Vol. III) (Denial of appellant Robbins' renewed motion to suppress).

3. Transcript of the Pleadings, etc. (Record on Appeal) at 17 (Denial of appellant Hair's motions to suppress and for severance, 11/15/68).

4. Tr. at 89 (Vol. II) (Overruling of counsels' hearsay objection to testimony that robbers were said to be in a white convertible).

5. Tr. at 120 (Vol. II) (Admission over objection of guns into evidence).

6. Tr. at 201 (Vol. III) (Counsels' joint motion for judgment of acquittal overruled).

7. Tr. at 304, 305 (Vol. IV) (Instruction on the inference to be derived from possession of recently stolen property).

### REFERENCES

I. With respect to Point I of the Argument, infra, it is desired that the Court read the following pages of the reporter's transcripts:

Motion to Suppress transcript (hereinafter M.S. Tr.) at 8-11, 13-19, 25-29;

Tr. at 4, 5, 9-10, 96-113, 119-121, 198, 273.

II. With respect to Point II of the Argument, infra, it is desired that the Court read the following pages of the reporter's transcripts:

Tr. at 89, 91, 93.

III. With respect to Point III of the Argument, infra, it is desired that the Court read the following pages of the reporter's transcripts:

Tr. at 304-05.

IV. With respect to Point IV of the Argument, infra, it is desired that the Court read the following pages of the reporter's transcripts:

Tr. 198-201.

V. With respect to Point V of the Argument, infra, it is desired that the Court read the following pages of the reporter's transcripts:

Tr. 120, 198-201.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 23,069
No. 23,070

---

WILLIE A. ROBBINS,
NATHANIEL HAIR,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

---

ON APPEAL FROM JUDGMENTS OF
CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

## STATEMENT OF THE CASE

### 1. Jurisdiction

These consolidated appeals are from judgments of conviction of Willie A. Robbins for assault on a person having charge of mail matter of the United States [18 U.S.C. 2114], armed robbery [22 D.C. Code 502] and carrying a dangerous weapon [22 D.C. Code 502] and assault with a dangerous weapon [22 D.C. Code 3304]; and of Nathaniel Hair for assault on a person having charge of mail matter [18 U.S.C. 2114] and robbery [22 D.C. Code 3202]. The judgments were entered on March 28, 1969,

pursuant to a jury verdict of guilty rendered January 16, 1969. Appellant Robbins was sentenced to eight years to twenty-five years on Counts 1, 5, 9, 13 and 17 (charging assault on a person having charge of mail matter); fifteen years to life on Counts 2, 6, 10, 14 and 18 (charging armed robbery); three years to ten years on Counts 4, 8, 12, 16 and 20 (charging assault with a dangerous weapon) and three years to ten years on Count 21 (charging carrying a dangerous weapon), these sentences to run concurrently. Appellant Hair was sentenced to eight years to twenty-five years on Counts 1, 5, 9, 13 and 17 (assault on a person having charge of mail matter) and five years to fifteen years on Counts 3, 7, 11, 15 and 19 (robbery), these sentences to run concurrently. Appellants' application to proceed on appeal without prepayment of costs was granted by the District Court on April 10, 1969. Jurisdiction to decide this appeal is vested in this Court by virtue of Sections 1291, 1294 and 1915 of Title 28 of the United States Code [28 U.S.C. 1291, 1294, 1915].

## 2. The Facts

Both Nathaniel Hair and Willie A. Robbins were charged in a twenty-two count indictment filed September 30, 1968 with the offenses particularized above stemming from the robbery of the United States Post Office at 1408 14th Street. On November 15, 1968, appellant Hair moved before Judge Pratt of the District Court for a severance and to suppress evidence.

The following facts were developed during that motion to suppress. Officer Howe testified that he was patrolling 14th Street at approximately 3:30 on the afternoon of June 3, 1968, on a motorcycle when he was hailed by a pedestrian who told him the Post Office at 1408 14th Street had been robbed. Officer Howe radioed this news to the dispatcher, dismounted and

entered the Post Office. Several employees were describing the robbery when an unidentified Negro male came forward and said, "Officer, I saw three men run out of the Post Office carrying a gray trash can, and got into a white or light colored dirty automobile; they went that way." [Motion to Suppress Tr. at 5, November 15, 1968. (Hereinafter cited as M.S. Tr.)].

Officer Howe relayed this to Officer Brown who had then arrived. Understanding the car to be white, Officer Brown began a search for a white car occupied by three Negro males [M.S. Tr. at 8]. Within minutes he came upon a yellow 1962 Ford convertible with one Negro male in it. Since the street was one-way, Officer Brown was able to approach and inspect this car on the passenger side. He noticed that the inspection sticker had expired; but, upon further observing the interior of the car, he determined that it contained only a bundle of clothes in the front seat. He decided the driver was merely on the way to the cleaners and was not the Post Office robber. [M.S. Tr. at 10]. The yellow Ford convertible turned west and the Officer continued north [M.S. Tr. at 10]. Several seconds or a few minutes later, while circling to the west, Officer Brown again, coincidentally, saw the yellow Ford convertible but then with three Negro males in it. He radioed this to the dispatcher and followed. The car stopped and discharged one passenger. Officer Brown radioed for help. When two other officers arrived, 3:50 p.m., they stopped the car and arrested the occupants. When asked why he stopped the yellow Ford convertible, Officer Brown answered: "Because I was looking for three Negro males in a white convertible who had just held up a Post Office." [M.S. Tr. at 17].

As he approached one side of the car, opened the door, and ordered appellant Hair and appellant Robbins to get out, one of the arresting officers (McCleese) was reported to have said: "These are the ones; here is the money and the trash can." [M.S. Tr. at 14]. A further search disclosed one gun under the front seat, one under a rear floor mat. U.S. currency identifiable by previously recorded serial numbers was found in a trash can in the rear seat of the car and in appellant Robbins pockets. No identifiable proceeds of the Post Office robbery were found on appellant Hair.

Based on the testimony of Officers Brown and Howe at the motion to suppress, Judge Pratt ruled that there was probable cause to stop the car and arrest the occupants and that the evidence taken could be used at trial. He denied without opinion the motion for severance [Transcript of the pleadings at 17].

On the day trial commenced, January 17, 1969, before Judge Green, appellant Robbins moved to suppress evidence. The motion was argued on the factual record previously developed before Judge Pratt and was denied. [Tr. 4, 5, 9]. The case proceeded to trial.

The Government produced seven eyewitnesses. Although two suggested that they thought appellant Robbins was one of the robbers, not one identified appellant Hair as having been a participant. One, in fact, testified that the man with the gun was not in the courtroom. [Tr. 85].

Herman L. Jones testified that he was the acting superintendent of the Mid - City Post Office Station at 1408 14th Street on July 3, 1968. At approximately 3:00 p.m., while he was working in the back of the Post Office with Mrs. Crockett, a clerk, Mrs. Snyder, another clerk, screamed

that there was a man in the Post Office with a gun. Jones testified that one man came behind the counter and that he observed two more men and that some of them had guns.

Although he told the grand jury he could not recognize anyone, at trial he said he could recognize appellant Robbins' face "in the action" but he did not know what part he played or whether he had a gun. He could not identify appellant Hair at all. He testified that the thieves took, among other things, certain "bait" money identifiable by serial number.

Trixie Crockett testified to essentially the same facts but added that she could identify appellant Robbins and that he had a gun and told her to lie on the floor. She could not identify appellant Hair.

Fleming Brown [Tr. at 79] could not tell who had guns and could not identify anyone.

Robert Johnson [Tr. at 82] saw two guns but could not identify anyone.

Agnes Snyder [Tr. at 84] the clerk who ran to the back screaming that there was a man in front with a gun, testified that the man with the gun was not in the courtroom.

Cornelius Curry [Tr. at 86] saw a man with a gun but could not identify him.

Harold Kramer [Tr. at 88] testified that he told an officer on a motor scooter who came up that the Post Office had been robbed and that while they were talking "some chap came up and said they went into a white convertible." [Tr. at 89] This testimony was allowed to stand over objection on hearsay grounds. It was repeated by the Assistant U.S. Attorney [Tr. at 89] and Officer Howe [Tr. at 93].

Officer Brown [Tr. at 100] repeated his testimony from the earlier Motion to Suppress including the statement that he had decided that the yellow Ford was not the vehicle.

The Court admitted into evidence the guns [Tr. at 121] found in the car, the money, trash can and stamps.

Appellant Robbins took the stand and denied participation in the robbery. He stated he was driving in the area, saw appellant Hair, an acquaintance, and picked him up. Soon thereafter, they saw a man with a waste basket and sofa cushions who was hitchhiking; and, thinking he was from Resurrection City and wanting to do him a good turn, they picked him up. When they let him out, he gave appellant Robbins several bills, which Robbins did not examine, as payment.

Appellant Hair took the stand in his defense and presented essentially the same facts as had appellant Robbins.

The jury found appellant Robbins guilty of assault on a person having charge of mail matter, armed robbery, assault with a dangerous weapon and carrying a dangerous weapon. Alleppant Hair was found guilty of assault on a person having charge of mail matter and robbery.

## INTRODUCTION

Appellants present five points. Two relate to both of them. First, since there was neither probable cause nor reasonable grounds either to arrest or seize appellants, both convictions must be reversed because of the admission into evidence of items seized by the police in the course of a search incident to the unlawful arrest; and second, that reversal is required because of the erroneous admission, over objection, of highly prejudicial hearsay testimony.

Appellant Hair raises three additional points, each of which require reversal as to him. First, the District Court committed plain error in instructing on the inference to be derived from the possession of recently stolen property; second, the District Court erroneously denied his motion for severance and failed to observe its duty to grant severance whenever justice demands it; and third, there was insufficient evidence to support his conviction.

## ARGUMENT

### I. As to Both Appellants, the District Court Committed Reversible Error by Admitting Evidence Seized in Violation of Appellants' Rights Guaranteed by the Fourth Amendment to the Constitution.

[With respect to Point I of the Argument, it is desired that the Court read the following pages of the Reporter's transcripts: Motion to Suppress Transcript [hereinafter M.S. Tr.] at 8-11, 13-19, 25-29; Trial transcript [hereinafter Tr.] at 4-5, 9-10, 96-113, 119-121, 198, 273; transcript of the pleadings, etc. (Record on Appeal) at 17].

The District Court admitted into evidence against appellants two guns found under the seat and floor mat of appellant's car, a trash can, monies and stamps identified as having been stolen from the Post Office and found on the back seat of the car, and money identified as having been stolen from the Post Office found in appellant Robbins' pockets.

Officers Brown and McCleese testified that the items were in plain view when they opened the car doors and looked inside. In receiving these items in evidence, the Court committed reversible error, of constitutional proportions, since under any proper analysis these items had been seized in contravention of appellants' Fourth Amendment rights, having come into

plain view only subsequent to an arrest without probable cause and during an unreasonable seizure. [Weeks v. United States, 232 U.S. 383 (1914); See, Beck v. Ohio, 379 U.S. 89, 91 (1964)].

A. Appellants Were Arrested When the Police Converged on their Car, Ordered it to Halt, Surrounded it, Ordered Appellants Out and Opened the Doors; but, at that Point, the Police Lacked the Probable Cause Required by the Fourth Amendment.

The often-stated standard of reasonableness for a warrantless arrest is whether a prudent police officer would reasonably believe that defendants' conduct was probably in violation of the law [E.g., Terry v. Ohio, 392 U.S. 1 (1968)] or whether there was a reasonable ground for belief of guilt [Brinegar v. United States, 338 U.S. 160, 175 (1949); Beck v. Ohio, 379 U.S. 89, 91 (1964); Worthy v. United States, ___ App. D.C. ___, 409 F.2d 1105 (1968)]. In determining the reasonableness of the arresting police officer's belief, courts look to the totality of the circumstances of which that officer was aware or upon which he was acting at the time of the arrest. [E.g., Bell v. United States, 102 App. D.C. 383, 387, 254 F.2d 82, 86, cert. denied, 358 U.S. 885, 79 S.Ct. 126, 3 L.Ed. 2d 113 (1958)]. But, the Supreme Court has recently pointed out that "totality of the circumstances" may not be used as a broad brush to paint over the unreliability of information or its source. [Spinelli v. United States, 393 U.S. 410 (1969); See also, Chimel v. California, 89 S.Ct. 2034 (1969).] It is necessary, therefore, to analyze the components of the information Officers Brown, McCleese and Baughn had when the arrest took place.

The arrest took place when the officers converged on and halted the defendants' car [Rios v. United States, 364 U.S. 253 (1960)] and ordered

them to get out [Sibron v. New York, 392 U.S. 40, 67 (1968)]. At the motion to suppress, Officer Brown described the sequence of events as follows [M.S. Tr. at 13, 14]:

> Q. [By Assistant U.S. Attorney Givelber] What did you do after stopping the vehicle?
>
> A. [By Officer Brown] I was in front of the vehicle when it stopped, and Officer McLeish [sic] was at the rear and Officer Vaughn [sic] was also at the rear of this vehicle.
>
> I went to the driver's side and told the driver to get out of the automobile, which he did.
>
> Officer McLeish [sic] took the passenger, the passenger, which was in the back seat, just in the back seat, Mr. Hair, told him to get out of the vehicle.
>
> At this time Officer McLeish [sic] said, "These are the ones. Here is the money and the trash can."

On cross-examination [M.S. Tr. at 19]:

> Q. [By Mr. Diamond] Why did you search the car?
>
> * * * * * * * *
>
> A. We observed the money in the basket. As soon as they got out of the car, we opened the door, and there sat the money in plain sight.

This sequence was re-affirmed upon the Court's inquiry [M.S. Tr. 26, 27].

When the defendants were ordered out of the car, they were under arrest. They were certainly not free to go, and surrounded by approaching officers, they were more than merely detained. Clearly they were arrested.

In Rios v. United States, 364 U.S. 253 (1960), the Supreme Court determined that an arrest takes place when the police order a car to halt and take their positions at its doors, [Rios at 261], if the police at that moment intend more than the momentary detention required by routine voluntary interrogation. [Rios at 262. See, Miranda v. Arizona, 384

U.S. 436, 477-78 (1966)]. That was what occurred in the instant case. The police halted appellants' car and took up positions at its doors intending to arrest the appellants, not to invite them to engage in a "voluntary dialogue." [See, Washington v. United States, ___ App. D.C. ___, 397 F.2d 705,707 (Leventhal, J. concurring, 1968)]. The intent to arrest is clear. Private Brown had felt it necessary to radio for help, three police units were used to surround and halt the appellants' car, Officer Brown testified that they stopped the car because they were after the Post Office robbers [M.S. Tr. 17, 19, 26-27], the police opened the car doors and ordered appellants out.

This case is, therefore, unlike the procedures the Court approved in Goodwin v. United States, ___ App. D.C. ___, 347 F.2d 793 (1965) where upon observing the erratic and reckless behavior of a car, the police approached and asked the driver for his drivers license and registration. In fact, the instant case is analogous to the policeman grabbing Peters by the collar in Sibron v. New York, 392 U.S. 40, 67 (1968) - a situation the Supreme Court characterized as clearly one of arrest. The difference is that in the instant case, at this point of arrest, the police lacked probable cause.

At this point all of the information that the officers had was the hearsay by a stranger that three Negro males had left the Post Office carrying a trash can in a white convertible and that the Post Office had been robbed. They knew nothing of the reliability of the informant and his information was not only so vague as to be unable to support a warrant but it even misled the police as to the color of the car for which they were searching. They did not know the make of the car, the

year of the car, the license plate number or state of registration and they had no description of the car's occupants other than that they were thought to be three Negro males. No ages, complexions, features, heights, weights, or clothes descriptions were available to them. In fact, Officer Brown testified that the lack of any description hindered him in identifying any suspects.

> Q. [By Mr. Diamond][Tr. at 109, 110] And you were following the car because you had reason to believe that the car could have been involved in the robbery?
>
> A. [By Officer Brown][Tr. at 110] Anybody could have been mistaken. I was looking out for a white convertible, but it could have just been dirty.
>
> * * * * * * * *
>
> Q. [By Mr. Diamond][Tr. at 110] Well, I don't want to appear argumentative, but you mean that you didn't know it was a person lying in there even though you had seen the clothes?
>
> A. [By Officer Brown][Tr. at 110] Well, I had no description of the person and no description of the clothing came up of the holdup men.

At this point the arresting officers had not opened the door to give themselves the plain view of the trash can and money which Officer Brown had failed to see earlier as he pulled beside and inspected the car without entering it. [M.S. Tr. at 10]

Aguilar v. Texas, 378 U.S. 108 (1964) enunciated a two-pronged test for measuring the quality and quantity of information deemed sufficient to a finding of probable cause. Under Aguilar it must appear (1) that there was reason to believe that the source of the information was reliable and (2) that the particular information given was itself reliable. While extrinsic corroborative detail may buttress a conclusion of reliability relating to either prong of the test, in Spinelli v. United States,

393 U.S. 410 (1969) the Supreme Court declared that Draper v. United States, 358 U.S. 307 (1959) was to be the bench mark for such detail.

Here the information available to the arresting officers was insufficient to establish the reliability of the informant. He was and remains an unknown stranger. He was never produced at trial. There was no reason to credit his story and not even a conclusion of reliability was suggested to the officer. Nor is there sufficient corroborating detail to fill this deficiency. No one else confirmed the story or the description. In fact, the police sought no such confirmation. [Tr. at 110] The only other fact they knew was that the Post Office had been robbed. Moreover the information given lacked the important detail which in Draper, supra, suggested both that the informer was reliable and the information he had provided was accurate. In Draper, supra, the informer described with "minute particularity the clothes that Draper would be wearing upon his arrival at the Denver station". Such "minute particularity" is significantly absent from the facts of this case. [Tr. at 110] Indeed, the information was so vague that the officer at one point decided the car he was following was not that of the suspect, and later he testified that he did not make an arrest when he first saw the car because he did not have an adequate description. [Tr. 110 quoted supra.] Nothing was gleaned from the surveillance to buttress the information given.

The information given was similarly insufficient to suggest its own reliability. In fact, it was not only vague but obviously inaccurate. While here the informer stated that he had seen that which he described, Officer Brown admitted he thought the description was inaccurate. [Tr. at 110 quoted supra.] Moreover in Draper, supra, when the officers at the

station saw Draper fitting the "minute detail" of the particular description it was apparent that independent police work had corroborated more than one small detail provided by the informant. Here not one detail was corroborated until after the arrest was made and the search conducted.

This case, therefore, is different from Bailey v. United States, 128 App. D.C. 354, 389 F.2d 305 (1967) in which the description of the car and occupants was complete and detailed, and from Dorsey v. United States, 125 App. D.C. 355, 372 F.2d 928 (D.C. Cir. 1967) in which the Court upheld the investigative approach of special narcotics officers to a car with a flashlight at night. In this latter case the officers had particular reasons to approach and saw evidence of crime before they arrested. Neither does Washington v. United States, ___ App. D.C. ___, 397 F.2d 705 (1968) sanction the conduct here for there the police had probable cause before they began the chase since they had seen a known narcotics user passing items with other known users. Here the available information simply did not support probable cause. Accordingly, the evidence was improperly admitted and the convictions of both appellants must be reversed. [Weeks v. United States, 232 U.S. 383 (1914).]

B. Regardless of When the Technical Arrest Took Place, An Unreasonable Seizure Occurred and the Use of its Fruits Demands Reversal.

Terry v. Ohio, 392 U.S. 1 (1968) affirmed the theory that the Fourth Amendment is relevant short of arrest [Terry at 16] and that a seizure short of arrest for whatever purpose must be reasonable [Terry at 19]. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." [Terry at 16] Here,

therefore, at least seizure, if not an arrest occurred when the police stopped appellant's car. The issue is whether at this point seizure was reasonable.

In beginning to chart the parameters of reasonableness in this context, the Supreme Court in Terry, supra, necessarily struck a balance between police duty to investigate suspicious circumstances and individual liberty. In doing this, however, the Court emphasized that to "seize a person" short of arrest, his conduct must be suspicious and the officer must have more than a hunch. [Terry, supra, at 15, 21-23]. It must be "restrained investigative conduct undertaken on the basis of ample factual justification..." [Terry, supra, at 15.] Here, however, there was no flight, no erratic behavior. In this case emphasis was on the fact that the conduct of appellant was not unusual. [Tr. at 104] The circumstances were so normal, that the Assistant U.S. Attorney found it necessary to argue that the non-suspicious conduct of the appellants was not unusual for criminals and the natural inference of innocence, for some reason should not arise. [Tr. at 273]. Here it is apparent that the officers lacked more than probable cause [Spinelli v. United States, 393 U.S. 410 (1969)]; they did not have even a reasonable suspicion. [Compare Tr. at 110 with Terry v. Ohio, 392 U.S. 1, 23 (1968).]

Nor can the acts of the arresting officers be characterized as mere fulfillment of their duty to get a closer look at suspicious circumstances, or as a mere questioning of potential suspects on a voluntary basis. Appellants did not volunteer to stop and speak with the officers; they were ordered to do so.

The facts of this case are strikingly similar to those in Gatlin v. United States, 117 App. D.C. 123, 326 F.2d 666 (1963) where in holding that an arrest was for investigative purposes and without probable cause the Court at 670-671 stated:

> The only evidence on which the arrest was predicated was the fact that there was a robbery, that one of the robbers was a Negro wearing a trench coat, that a Negro man fled from a taxi, and that Gatlin, a Negro man, was observed walking down the street a mile and a half from the robbery wearing a trench coat. This is not the type of evidence which would justify deprivation of liberty.

Observation of two or three Negro males in a white or light convertible, but otherwise unspecified and undistinguished, is not enough to justify their arrest or seizure. Even if a known, reliable informant had given the police the information on which they presumed to act, the "information" itself was clearly insufficient, under the Gatlin standard, to "justify deprivation of liberty." The one, two or three Negro males observed by Officer Brown in a white or light but otherwise unspecified and undistinguished convertible, might well have been enroute to the cleaners, as he originally thought. Indeed, the description of the get-away car and the suspects which was available to the police at the time appellants were halted and searched was so vague and general as to fit virtually any light colored car in Washington. Accordingly, appellants' arrest was not justifiable and admission into evidence of items seized in the course of a search incident to the illegal arrest was constitutional error requiring reversal as to both appellants.

II. As to Both Appellants, the District Court Committed Reversible Error in Overruling Counsels' Hearsay Objection to the Statement of a Witness that an Unidentified Stranger Told the Police that the Three Robbers had Gotten Away in a White Convertible.

[With respect to Point II of the Argument, it is desired that the Court read the following pages of the Reporter's transcripts: Tr. at 89, 91, 93.]

The District Court permitted the following statements by witness Harold Kramer over defense counsel's objection on hearsay grounds:

> A. "And another chap came up and said they went into a white convertible." [Tr. at 89]

On cross-examination:

> Q. [By Mr. Diamond] Did you tell the police officer that the people who committed this robbery got into a white convertible?
>
> A. [By Harold Kramer] I didn't tell them that. It was the man who came up who said that to the officer. [Tr. at 91]

Officer Howe repeated the thought when he testified:

> A. "Well, as I was talking to the man, a middle-aged Negro approached me at the doorway, or as I was leaving the door and said he had seen the men run from the Post Office carrying a trash can and they got into a light-colored convertible and he said, 'That way', by 'that way', he meant west on Rhode Island Avenue, between 14th and 15th Streets, and made a right turn at 15th and went north." [Tr. at 93]

This testimony was subject to two interpretations. First, it explained why the police were looking for a white convertible. Secondly, however, it stated that there were three Negro males who robbed the Post Office and declared that they would be found in a white convertible. It was in this sense, for the truth of the matter asserted, that it was offered and argued to the jury and for that reason it was hearsay. (E.g.,

McCormick, Evidence 462-63 (1954)). In this situation, that is when testimony is offered which has both hearsay and non-hearsay elements, to a jury, it must be excluded [Smith v. United States, 70 App. D.C. 255, 105 F.2d 778 (1939); Accord Abrams v. United States, 117 App. D.C. 200, 327 F.2d 898 (1964); Leigh v. United States, 113 App. D.C. 390, 308 F.2d 345 (1962)] and failure to do so is reversible error. [Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966); Landsdown v. United States, 348 F.2d 405 (5th Cir. 1965).

The law of the District of Columbia holds that an officer may state in general terms that he had "certain general information", and the trial Judge should then caution the jury that the evidence was admitted for a limited purpose. But "he may not go further and testify as to precisely what he was told about the particular place or the particular person." [Smith, supra, 70 App. D.C. at 256, 105 F.2d at 779.]

In Smith, supra, the Court did not reverse because the evidence was otherwise overwhelming and because it felt it "would be going quite far." Two factors have changed that conclusion and distinguish this case. First, here the evidence is not otherwise overwhelming as to either defendant. As to appellant Hair, indeed, there is no evidence other than that he was in such a car. On facts where the evidence was stronger and citing Smith, supra, the Fifth Circuit has stated:

> "[N]o proper purpose would be served here by the admission of such irrelevant testimony which was clearly prejudicial to the accused. Even though such testimony might have some relevance on a motion to suppress evidence, conducted out of the jury's presence, it has no place in the trial itself.... [Landsdown v. United States, 348 F.2d 405, 413 (5th Cir. 1965)].

It held this to be reversible error. [Landsdown, supra at 413-414. Accord Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967); McMillian v. United States, 363, F.2d 165, 167 (5th Cir. 1966)].

Second, Bruton v. United States, 391 U.S. 123 (1968) held that erroneous admission of inculpatory hearsay in a joint trial even with a limiting instruction to the jury that it was not to apply to a co-defendant was reversible error as to that co-defendant, since he was denied his constitutional right of confrontation secured by the Sixth Amendment. [Bruton, supra at 126] The same difficulty arises here as to both appellants. The inculpatory hearsay testimony of what purported to be an eyewitness was admitted [Tr. at 89]; but neither appellant could cross-examine that witness.

Proctor v. United States, ___ App. D.C. ___, 404 F.2d 819, 821 (1968), recognized any statement may take on the inculpatory qualities of a confession. Here, therefore, as in Bruton, the defendants were denied the constitutional right to confront an important witness against them and reversal is required. [Bruton v. United States, 391 U.S. 123 (1968)]. As the Supreme Court said of the right to counsel, this "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." [Glasser v. United States, 315 U.S. 60, 75-76; 62 S.Ct. 457, 467; 86 L.Ed. 680 (1942). Accord, see Griffin v. California, 390 U.S. 609, 85 S.Ct. 1229 (1965).]

III. As to Appellant Hair, the District Court Committed Plain Error in Instructing the Jury that they Could Derive an Inference of Guilt From His Possession of Recently Stolen Property.

[With respect to Point III of the Argument, it is desired that the Court read the following pages of the Reporter's transcripts: Tr. at 304-305]

The District Court Judge instructed that:

> "If you find beyond a reasonable doubt that the defendant, or defendants, were in exclusive possession of the property of the complainants, and that this property had recently been stolen and the defendant, or defendants', possession of the property on the date in question, and under the circumstances in question, has not been satisfactorily explained, then you may, if you see fit to do so, infer therefrom, that the defendant, or defendants, is, or are, guilty of robbery. You are not required so to infer, but you may do so, if you deem it appropriate.
>
> "The term 'recently stolen' does not refer to any specific period of time. It is for you to determine on the basis of all the facts and circumstances, whether the property was recently stolen. The longer the period of time the property is stolen, the weaker the inference that may be drawn from the possession of the property." [Tr. at 304-305]

The Judge did not explain the meaning of "exclusive possession" and neither related the instruction to any of the facts, nor limited it to either defendant in any particular circumstance. Nor, indeed did the Judge in any way explain or elaborate on the language quoted above.

This Court has several times recognized the difficulties inherent in instructing on this subject and the need to instruct the jury carefully and fully, tailoring the charge to the facts of the case. [E.g., Cooper v. United States, 123 App. D.C. 83, 357 F.2d 274, 276 (concurring opinion 1966).]

The District Court's failure to tailor the charge to the facts at hand here was fatally prejudicial to appellant Hair and necessarily confusing to the jury. This confusion is apparent from the verdict. The jury found appellant Hair not guilty of the charges of carrying a dangerous weapon, assault with a dangerous weapon and armed robbery; but, guilty of those counts of the indictment charging assault on a person having charge of mail matter with a gun (Counts 1, 5, 9, 13 and 17). This Court has recently stated that the justification for the instruction lies in the existence of the facts upon which it is predicated and the reasonableness of the inferences one may derive from those facts. [Pendergrast v. United States, Number 21,031 (January 31, 1969).] Obviously, before any inference should be permitted to be drawn the accused must be shown to have exclusive possession of recently stolen property.

Appellant Hair did not have "exclusive possession" of the car or anything in it. He was a passenger and was neither the owner nor in charge of directing the driver. He may have known of the presence of the trash can; but, there is no evidence that he knew of its contents, or that it was stolen. There is no evidence he exercised dominion over it at any time. The same is true of the guns found under the seat and under the floor mat. Indeed, there is no evidence that he even knew they were there. Some money was found on his person but it was not identified as being from the Post Office. In the case of appellant Hair, therefore, the prerequisites for the invocation of the inference were not as a matter law present although the instruction was clearly stated as applying to both defendants. Possession is of central importance here. It is necessary to trigger the inference in question and it

is concomitantly crucial to appellants' theory of the case. Appellant Hair possessed nothing to link him to the robbery.

Bruton v. United States, 391 U.S. 123 (1968) demonstrates a recognition of the importance of having evidence and law presented to the jury in a practical as well as technically reasonable fashion. The error here, therefore, was plain error, [52(b) F.R.Crim.P.], a "defect affecting substantial rights" so confusing as to deny defendant a fair trial. [Proctor v. United States, ___ App. D.C. ___, 404 F.2d 819, 822 (1968).] The case must be reversed, and a new trial ordered as to appellant Hair.

## IV. As to Appellant Hair, the District Court Committed Reversible Error in Not Granting a Severance and Separate Trials Because There Was No Evidence Inculpating Appellant Hair Other Than His Association With Appellant Robbins.

[With respect to Point IV of the Argument, it is desired that the Court read the following pages of the Reporter's transcript: Tr. at 198-201; Transcript of the Pleadings, (Record on Appeal), etc.]

Rule 14 of the Federal Rules of Criminal Procedure enables a District Court effectively to prevent guilt being determined merely by association and other than by competent evidence by authorizing severance of defendants whenever the interests of justice require it. The invocation of this discretion is imperative when in a case involving two defendants the only evidence against one is that a robbery was committed and that he was found in an automobile with the co-defendant who had proceeds of the crime in his possession and who was identified as one of the robbers. No one of the seven witnesses was able to identify appellant Hair as one of the robbers. No part of the identifiable proceeds of the robbery was found in his possession. There was no evidence to link him to the robbery.

Two principles, here relevant, underpin the holding in Bruton v. United States, 391 U.S. 123 (1968). First, there is a significant need to protect a co-defendant from being irreparably prejudiced by the introduction into evidence of inflamatory testimony against another co-defendant; and, second, the shibolith that it is reasonably possible for a jury to follow sufficiently clear instructions and keep evidence separate as to different defendants is not a valid proposition in some situations. In reversing under Bruton for failure to grant a severance this Court emphasized in Simms v. United States, ___ App. D.C. ___, 405 F.2d 1381 (1968)] at 1382-3 that: "Bruton v. United States clearly shows the hollowness of such cautionary instructions and illuminates the charade of pretending that the jury can put out of its mind damaging evidence it has just heard...." It is unrealistic to assume that a jury will confine condemning implications to only the particular defendant actually identified. "A jury cannot segregate evidence into separate intellectual boxes..." People v. Aranda, 63 Cal. 2d 518, 529, 407 P.2d 265, 272, (1965). "The naive assumption that prejudicial effects can be overcome by instructions to the jury [is an] unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949)(concurring opinion of Mr. Justice Jackson). See also Jackson v. Denno, 378 U.S. 368 (1964); Nash v. United States, 54 F.2d 1006, 1007, cert. denied 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932); Proctor v. United States, ___ App. D.C.___, 404 F.2d 819 (1968).

Only guilt by association can result from a joint trial on facts such as these. Notions of judicial economy and conservation of prosecutorial resources must here give way to the fundamental values of fairness

embodied in Rule 14. There may be merit in permitting joint trials where there is merely evidence of unequal weight against the proposed defendants. It is quite a different matter to permit that result where as here the evidence against one may appear formidable, while that against the other is minimal, if present at all, and is in fact only based on the association with the other.

In Simms v. United States, ___ App. D.C. ___, 405 F.2d 1381 (1968) this Court declared at 1328 footnote 1 that: "the trial Judge, under Rule 14, has 'a continuing duty at all stages of the trial to grant a severance if prejudice does appear'. Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed. 2d 921 (1960); United States v. Vida, 6 Cir. 370 F.2d 759, 765 (1966) cert. denied, 387 U.S. 910, 87 S.Ct. (1965) 18 L.Ed. 2d 630 (1967)." This duty should have been fulfilled at the close of the Government's case when the differing postures of the evidence against the defendants were obvious. Not to do so was plain error requiring reversal.

V. As to Appellant Hair, the District Court Committed Reversible Error in Denying His Motion for a Judgment of Acquittal For the Reason That There Was Insufficient Evidence to Sustain a Finding of Guilt.

[With respect to Point V of the Argument, it is desired that the Court read the following pages of the Reporter's transcripts: Tr. at 120, 198-201.]

No witness identified appellant Hair as one of the robbers. No identifiable proceeds of the crime were found on him. The sole circumstance associating him with the crime was that he was found in the car which contained some of the proceeds. The Government argued that his

proximity to a gun found under a floor mat in the back seat was indicative of his participation, but the jury found him not guilty of carrying a dangerous weapon and not guilty of assault with a dangerous weapon.[1/] It was not shown that appellant Hair in any manner possessed any of the proceeds of the robbery. They were in a trash can in the car in which he was a passenger but there was no evidence that he possessed the trash can and he was not the operator of the car. In this respect this case is identical to Goodwin v. United States, 121 App. D.C. 9, 347 F.2d 793 (1965). In reversing a co-defendant's conviction in that case the Court stated (121 App. D.C. at 11, 347 F.2d at 795):

> "He was not shown to have been in the store during the robbery ... Although the officer who saw the car speeding away within minutes after the crime, said it contained four colored males, he did not attempt to identify any of them.
>
> [The appellant] ... denied any participation in the crime. He was not identified by anyone. After some hesitation, the trial Judge decided to submit his case to the jury on the idea that, being in the car when the officer stopped it, he was in possession of the recently stolen articles found therein.
>
> ...Nor was [his] presence in the car at the time of the arrests sufficient, we think, to show that he was in possession of the recently stolen articles here involved. As to him the judgment must be set aside.

The same result is required here: As to appellant Hair, the case must be reversed.

---

1/ The admission of the guns was error, certainly as to Hair for no one identified him as being in the Post Office, as having a gun or as knowing the guns were in the car. They were admitted over counsel's objection with no limiting instruction. [Tr. 120]

## CONCLUSION

For all of the reasons set forth in points one and two above, the judgments of conviction as to both appellants should be reversed and the case remanded with instructions to dismiss the indictment; for all of the reasons set forth in points three, four and five above the judgment of conviction as to appellant Hair should be reversed and the case remanded with instructions to grant a new trial.

Dated: October 15, 1969

Respectfully submitted,

Daniel H. Margolis
Counsel for Appellants
(Appointed by this Court)

James R. Loftis, III
(Of Counsel)

888 Seventeenth Street, N. W.
Washington, D. C. 20006

of guilt; and, accordingly, under Goodwin, supra, the case should not have gone to the jury with an instruction on the inference to be derived from exclusive possession of recently stolen property, the evidence was insufficient to support a verdict of guilt, and this Court erred in affirming petitioner Hair's conviction.

## CONCLUSION

Therefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

Daniel H. Margolis
James R. Loftis, III
Counsel for Petitioner
(Appointed by this Court)

888 Seventeenth Street, N.W.
Washington, D. C. 20006
Telephone: 298-5900